No. 12227

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

CECELIA J. WILSON,

Respondent.

REPLY BRIEF OF APPELLANT

On Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHASE A. CLARK, *Judge*

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN,
T. H. EBERLE,
Boise, Idaho,
Attorneys for Appellant.

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SUBJECT INDEX

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WHAT THE OPENING BRIEF ESTABLISHED

1. Decedent was given a sedative to relax and induce sleep; there was no allergy or hypersusceptibility to such sedative and the same did not cause any injury to decedent; snoring and coughing were unconnected with the sedative and only natural result of sleep; all parties knew decedent was a pronounced snorer and always snored when asleep; while any patient is asleep phlegm gathers in the trachia; coughing prevents pulmonary congestion; decedent's actions during and subsequent to operation were the same as in ordinary life; decendent's physician knew of all circumstances involved, including prior operations, personal habits, hazards of operative procedure and thrombi or blood clots;

50% to 80% of all post-operative deaths due to emboli; decedent had a bodily infirmity and disease, and due to the same a slight cough, whether in or out of the hospital, could have resulted in death, and such bodily infirmity and disease actually caused his death.

2. Dr. Call executed decedent's death certificate and was required by law to state primary and contributing causes, as well as course and sequence thereof, and although presumed to have complied with statutory duty, made no reference to the snoring or coughing or any untoward or unusual circumstance as contributing to death and did not state that the same was an accident, unless an embolism was so classed.

3. Decedent's death did not result independently of all other causes from bodily injury effected solely through accidental cause but was caused by bodily infirmity or disease.

WHAT APPELLEE'S BRIEF FAILED TO DISCUSS

1. Failed to discuss the first of the above points except to state there was a dispute among the experts and that under the Idaho law decedent's death was an accident.

2. Failed to even refer to the second point, above mentioned, and apparently relied on Dr. Call's oral testimony to impeach his written certificate.

3. Failed to even discuss the third point, above mentioned, and merely stated that the rule of law

set forth is supported by respectable authority, but the same is contrary to the holding of the Idaho courts, which statement we shall hereinafter discuss.

FINDINGS ARE CLEARLY ERRONEOUS

Appellee appears to rely upon Rule 52 (a) as amended. No amendment has been made to the provisions relating to setting aside of findings and the rule as stated by this Court in Smith vs. Royal Insurance Company, 125 Fed. 2, 222, that a finding does not command the strong presumption of verity where the "bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute." In the case at bar, not only was the evidence of four doctors by deposition (only three doctors testifying orally) and the death certificate also in writing, but as to all material facts there is no conflict whatsoever in the testimony.

As above noted, appellee's only reply to the testimony relied upon by appellant, is a statement that there is a dispute between experts. Counsel quotes briefly from the testimony of Dr. Call. It was Dr. Call, decedent's personal physician and appellee's principle witness, who, when the nurse reported loud, continuous snoring, assured her "this was a common thing with Mr. Wilson, that he always snored" (T. 63). It was Dr. Call who said decedent's actions during the operation and subsequent thereto,

were no different than in ordinary life (T. 115). It was Dr. Call who said that when asleep decedent was a pronounced snorer, whom he had known many years, and that the sedative merely induced sleep, and when asleep decedent would snore the same way, with or without an opiate (T. 115).

Not only did Dr. Call know of decedent's previous operations and that as a residue of such operations lots of people had blood clots (T. 130), but Dr. Brothers, appellee's other witness, admitted that he knew Dr. Call was aware of the hazards of the surgical procedure, not only the snoring and breathing proclivities of decedent, but also the hazards resulting from previous operations, and that even a light cough might loosen such blood clots (T. 130).

There is no conflict in the evidence that 50% to 80% of all post-operative deaths are as a result of an embolism. In fact, the only difference in the testimony of the doctors is in the phraseology of the foreseeability of post-operative death from embolism. All admitted that such death was a hazard of every operation; in fact, the greatest hazard. Drs. Call and Brothers felt there was not sufficient foreseeability to be an accident; Dr. Graves, who testified orally, and the four doctors who testified by deposition, all felt that the hazard was so well recognized that it could not be classed as an accident. Even Dr. Call was not certain of his conclusion when he signed the death certificate and said that it could not be classed as an accident unless embolism was so classed. Regardless of the conclusions

however, of these doctors, there is no dispute as to the facts.

There is no contradiction of the fact that decedent had no allergy or susceptibility to the sedative, nor that the sedative merely relaxed and induced sleep and when asleep decedent snored as he did in ordinary life, and that coughing was normal and encouraged to prevent pulmonary congestion, and it was well known to decedent and his doctors that with decedent's thrombosis, even a slight cough might cause death at any time, anywhere (T. 43, 95).

Appellee refers to Dr. Call's reference to the snoring and coughing as violent. An examination of his entire testimony, however, discloses that the actual facts are as stated in our opening brief. In other words, Dr. Call last saw decedent at eleven o'clock in the evening (T. 77). He did not see him again until after death. He had seen him several times during the day, but when he was there there was no such violence (T. 80), and he finally ended up by saying he based his opinion on the record (T. 77). An examination of the hospital record, however, does not disclose any record of any snoring after eleven o'clock. Accordingly, Dr. Call neither saw nor heard anything but the usual snoring of the decedent, nor was there anything in the record upon which to base generality of violence which he used and which was quoted.

Excluding the generalities volunteered by Dr. Call, the actual facts to which he testified correspond to the death certificate. In other words, limit-

ing his testimony to the actual facts based upon his personal observation and the hospital record, he neither saw nor heard, nor does the record disclose, anything other than the actions of decedent in ordinary life. As pointed out ultimately, Dr. Call actually did state that decedent's actions in snoring and coughing were no different than in ordinary life. As pointed out in our opening brief, the law required Dr. Call, in executing the death certificate, to show the cause of death, sequence of causes resulting in death, giving primary cause, contributing causes, and duration of each. His answers were:

"Immediate cause of death: Duration:
Pulmonary embolism *Sudden*

Due to:
Herniorrhaphy *24 hrs.*"

(See defendant's Exhibit 10.)

There was no reference to any untoward, unexpected or unusual circumstances. He is presumed to have complied with his statutory duty and therefore the facts to which he testified, not the gratuitous statements to help his personal friend, must be accepted, and hence there is no dispute between him and any other witness when he states that the sedative merely induced sleep, that all parties concerned knew when asleep decedent was a pronounced snorer and would cough to prevent pulmonary congestion, that decedent had a bodily dis-

ease and infirmity, that with such thrombosis, even the slightest cough might cause death, and that decedent's actions were no different during and subsequent to the operation as in ordinary life, and that such bodily infirmity in fact caused decedent's death.

IDAHO CASES CITED BY APPELLEE

May we first note that none of the Idaho cases cited by appellee involved the question of whether the death was by accidental cause, independently of all other causes, under the terms of an insurance policy, which question we shall discuss later in this brief.

Appellee relies principally upon the case of Teater et al vs. Dairymen's Co-Operative et al, 190 Pac. 2d, 687. This case arose under the Workmen's Compensation law, which the Idaho courts have construed in the nature of industrial insurance, and under a definition of an accident construed to be any injury which has a causal connection with the death and sustained in the course of employment. Claimant had a heart affiiction and in the performance of his work lifted five gallon packers of ice cream and within ten minutes died of a heart attack. Undoubtedly the pre-existing condition contributed to his death. However, in the case of Bishop vs. Morrison-Knudsen Co., 137 Pac. 2d, 963, Supreme Court of Idaho held: "When the death results from an injury sustained by accident and pre-

existing disease contributing concurrently and effectively to employee's death, no apportionment can be made." In other words, unlike the exclusion in the policy involved herein, the Court held that under the Idaho statute the mere fact that there were other contributing causes did not prevent the allowance of the full amount of compensation. Accordingly, the same Court in the case of Teater vs. Dairymen's Co-Operative, supra, said: "Our statute prescribes no standard of fitness, makes no distinction between the sound and unsound, which, being true, compensation under the act is not based on * health *." "The fact that the diseased was suffering or afflicted with a serious heart ailment, predisposing him to coronary occlusion, was of no consequence in the case *." Manifestly this case can have no applicability to the case at bar, and particularly to the requirement of the policy that appellee must prove that death resulted from bodily injury through accidental cause, independently of all other causes, and not directly or indirectly caused by bodily infirmity or disease.

In the case of O'Neil vs. N.Y. Life Ins. Co., 152 Pac. 2, 707, where an altercation was involved, the Court said that: "It is not consistent with the experience of the average man that the one who enters into a brawl with his bare hands does so with the expectation that it may result fatally, if he has no reason to believe his antagonist is armed." Thus the Court indicated that if all the facts and circumstances were known, as in the case at bar, its decision would have been different. In other

words, as pointed out in the case of Borneman vs. John Hancock Mutual Life Insurance Co., 45 N.E. 2d, 452, if the nature of the assailant was such that serious results might be foreseeable, there could be no accident. In that case there was also an altercation, but it was with a former prize fighter; it was therefore to be expected that the blows would be knockdown and knockout punches. The Court said: "Under such circumstances, the fall of the insured, with the comcomitant injuries from impact with the pavement, cannot be said to be unforeseen, unexpected or extraordinary." So likewise, in the case at bar, all of the facts were not only known to the patient, but also to the doctor.

In the case of Rauert vs. Loyal Prot. Ins. Co., 106 Pac. 2, 1015, the Court endeavored to discriminate between accidental means and accidental result. This is not material in this case because so far as the facts are concerned, the statement of Justice Cardoza in the case of Landrass vs. Phoenix Mutual, 291 U.S. 491, is applicable; "If there was no accident in the means, there was none at the result, for the two were inseparable * * *. There was an accident throughout or there was no accident at all." In other words, in the case at bar there was neither accident in the means nor in the result.

Appellee also refers to the case of Jensma vs. Sun Life Ins. Co., 64 Fed. 2d, 457, decided by this Court and arising in the District of Idaho. The facts, however, cannot be brought within those of the case at bar. Illustrating the question involved, this Court

said: "It was admitted that ordinarily novocaine is absolutely harmless, and the evidence was that it proved fatal to the insured, who was a physician, because, unknown to himself and the operative physician, he had an 'idiocyncracy' or hypersusceptibility to the drug." Counsel endeavors to bring himself within this rule. He states that the opiate resulted in snoring and coughing; such result is not an allergy or hypersusceptibility to the drug, because all of the doctors testified that the purpose of the opiate was relaxation and to induce sleep, and the coughing was proper procedure to clear the phlegm under all circumstances, and that the snoring habits of this man when asleep, however, induced, were not unknown to himself and the physician, and that neither such condition, nor his previous operations were unknown.

APPELLEE NEITHER ARGUED NOR PROVED THAT DECEDENT'S DEATH RESULTED DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES FROM BODILY INJURY EFFECTED SOLELY THROUGH EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS, AND WAS NOT CAUSED DIRECTLY OR INDIRECTLY BY BODILY INFIRMITY OR DISEASE

Whether we accept appellee's play on words in saying that decedent would not have died of a blood clot if he had not had the last hernia operation, but that he did not die as a result thereof, or accept that fact that fifty to eighty percent of all post-operative deaths are due to blood clots, and such is a foreseeable hazard and expectation in all operative procedure, the fact remains that appellee's contentions and proof, adopted by the trial Court, are that decedent's death was due to a settled and determined bodily disease and infirmity.

Here, again, there is no conflict in the testimony to the effect that decedent did have a pre-existing bodily infirmity and disease. Appellee's doctors testified that decedent had a pre-existing thrombosis, the residue of prior operations. All of the expert witnesses, those testifying orally as well as by deposition, agreed that such thrombosis was a venous disease and a settled and determined bodily infirmity. Dr. Call testified:

> Q. Whether you say it came from the operation performed on April 7 or whether it came

from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir (T. 107).

In addition to testifying that such bodily infirmity and disease caused the decendent's death, Dr. Call further testified that where you have such a condition you can expect untoward results, saying:

> Q. The condition of the venous system is a co-existing condition. With surgery depending on that condition you have certain natural results, is that so, Doctor?
>
> A. If you have a diseased venous system you can expect untoward results (T. 90).

Dr. Brothers, appellee's other witness, confirmed Dr. Call as follows:

> Q. I think you said that the condition of his bodily infirmity with reference to snoring and coughing was the exciting cause of the embolism?
>
> A. Yes, sir (T. 129).

The insurance policy involved, in plain and every day language, sets out the risk covered under the double indemnity clause and requires that death result directly and independently from all other

causes. As said in White vs. New York Life Insurance Company, 145 Fed. 2d 504,

> "Under these provisions death must not only be caused from bodily injury effected through accidental cause, but it must not result directly or indirectly from physical or mental infirmity, illness, or disease."

Appellee's witnesses testified that the hernia was a contributing cause but that the bodily infirmity or disease of decendent was the primary cause of death.

> Q. What could have been the primary cause if the hernia was the contributing cause?
>
> A. Primarily it was due to the fact that there was a thrombus in the venous system (T. 103).

Dr. Graves, whom appellee quotes, describes the condition of decedent as a disease process.

> Q. Can this be designated as a disease process of the veins?
>
> A. Of the venous system (T. 149).

Dr. Beeman also referred to the condition as a diseased process of the venous system (T. 158).

Appellee's witness, Dr. Brothers, also testified that in view of the existing bodily infirmity, the amount of snoring or coughing, is immaterial (T. 130).

It is interesting to note that neither appellee in her brief nor the trial judge in his opinion discuss this testimony of appellee's witnesses.

This proof of appellee is so clear that it is not even mentioned in appellee's brief, but on page 16, appellee states that the rule set forth in our opening brief under the coverage provisions of the policy, requiring death from accidental cause to be independent of all other causes and not result directly or indirectly from bodily infirmity or disease, is supported by respectable authority but is not the rule in Idaho. No Idaho case, however, is cited involving such coverage provisions. Even in the case of Browning vs. Equitable Life Assurance Society, 72 Pac. (2d) Utah 1060, the Court specifically said:

> "The policy before us does not provide that recovery shall be had only if no other circumstances than the accident contributes to the disability."

Appellee states this case was approved by the Supreme Court of Idaho in Rauert vs. Loyal Protective Assurance Co., supra, but this is not the fact. Our Court merely approved certain language relative to liberal construction of insurance policies. The Utah case was severely criticized by the Chief Justice of the Utah court in an elaborate dissent and has never been adopted by any other Court. Appellee also quotes from the case of Manufacturers' Accident Indemnity Corporation vs. Dorgan 58 Fed. 945, but neglects to say that Chief Justic

Taft approved the rule set forth in our opening brief to the effect that no recovery can be had where death was caused or contributed to directly or indirectly by bodily infirmity or disease. Chief Justice Taft affirmed and approved the following instruction of the lower Court:

> "I instruct you, if he was at that moment overtaken with a trouble of which he was subject—that is, from a recurrence of a trouble to which he was subject—and he then fell in the brook and was drowned, that that would not be a case where a recovery could be had upon the policy, because his physical condition was a part of the causes contributing to the death."

Where a similar clause was contained in the policy, the Court, in Smith vs. Federal Life Ins. Co., 6 Fed. 2d 283, said:

> "The defendant wrote a guarantee against a certain sort of accident. That sort that 'directly' and 'independent' of other causes, 'through external, violent, and accidental means' produced the injury. The heart trouble was not 'external' nor 'violent,' nor was it an accidental malady. It was the residuum of a very troublesome and serious illness. The two contributed to, and caused death. I believe the law and the facts are with the defendant, and the jury will bring in a verdict for it."

In Preferred Accident Ins. Co. vs. Clark, 144 Fed. 2d 165, where there was a bodily infirmity in the nature of a gall bladder ailment, the Court said:

> "For example, one who submits to a simple appendectomy, where the condition is not acute, knows that he may be one of a comparatively small number who will die as a result of the operation. He does not expect death but he knows it may occur. In such cases, we do not think an ordinary man would say that the death was accidental. Here, the insured was suffering from a chronic gall bladder ailment. In addition to that, his appendix was seriously involved. He was also suffering from a parenchymatous degeneration of the liver and kidneys. He was 62 years of age. We do not think that the ordinary man, under the attending facts and circumstances, where a major operation in the upper abdominal cavity caused a pulmonary collapse resulting in death, would regard the death as accidental."

Decedent in the case at bar was also approximately 62 years of age.

It will be noted that in the case of Beile vs Travelers Ins. Co., 135 S.W. 497, cited by appellee, the Court did not pass upon a settled and determined bodily infirmity, as testified to by the doctor in the case at bar, but based its opinion upon mere lowering of vitality, saying: "In such case disease or low vitality does not arise to the dignit

of concurring causes, but in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

In the case of Howe vs. National Life Ins. Co., 72 N.E. 2d 425, where the bodily infirmity was an existing heart disease, the Court held:

> "The proofs construed most favorably to the plaintiff demonstrate the aggravation of an existing heart disease by an accident, and that the disease and the accident were the concurrent causes of death. But a death caused by the joint operation of a pre-existing disease and an accident is not within the scope of the policy. Page vs. Commercial Travellers' Eastern Accident Association, 225 Mass. 335, 114 N.E. 430; Leland vs. United Commercial Travelers, 233 Mass. 558, 124 N.E. 517; Kramer vs. New York Life Ins. Co., 293 Mass. 440; 200 N.E. 390; Aetna Life Ins. Co. vs. Ryan, 2 Cir., 255 Fed. 483, 486; Mutual Life Ins. Co. vs. Loeb, 5 Cir., 107 Fed. 2d 7; McMartin vs. Fidelity & Casualty Co., 264 N.Y. 220, 223, 190 N.E. 414."

Again referring to similar provisions in a policy, where the bodily infirmity was a heart condition and the question arose as to whether he died of an overdose of medicine taken by mistake or accident,

the Court, in White vs. New York Life Ins. Co., supra, held:

> "When the evidence is considered in the light of these provisions in the policy, it seems clear that if it be assumed that the insured took by mistake an overdose of medicine and that he had an accidental fall, and that either or both contributed to his death, appellant would not be entitled to recover in view of the positive and uncontroverted evidence that the insured's heart condition likewise contributed to his death."

No Court in Idaho has ever held that the double indemnity provisions of a policy involved, for which decedent paid a quarterly premium of $1.35, are invalid or inapplicable in this state, nor has appellee cited a single case contrary to the rules of law pertaining thereto, set forth herein and in our opening brief.

CONCLUSION

Appellee's brief, with one exception, does not even comment upon a single case cited by appellant, neither does it discuss the uncontradicted facts, and particularly the proof offered by the appellee, as hereinbefore pointed out, nor does it cite a single Idaho case applicable to the facts at bar, any case contrary to the decisions referred to in appellant's

brief, nor any valid argument why the judgment of the trial Court should not be reversed.

Respectfully submitted,

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